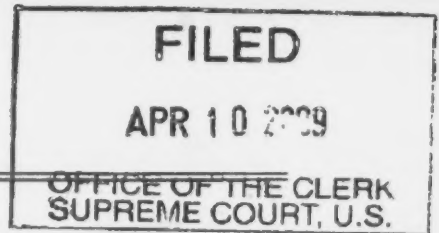


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(2)
No. 08-866



In The
Supreme Court of the United States

THE STATE OF NEVADA,

Petitioner,

v.

SHAWN RUSSELL HARTE,

Respondent.

**On Petition For A Writ Of Certiorari To The
Supreme Court Of The State Of Nevada**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED
(Capital Case)**

1. Whether the Nevada Supreme Court relied upon independent and adequate state grounds in deciding *McConnell v. State*, 102 P.3d 606 (2004).
2. Whether the decision in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004) represents an actual split of authority or whether the Nevada Supreme Court properly distinguished its own statutory scheme from the Louisiana statutory scheme at issue in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) and others.
3. Whether Harte would be treated disparately from other similarly situated defendants, in violation of the Equal Protection Clause, if certiorari were granted and the decision in *McConnell v. State*, 102 P.3d 606 (2004) were overturned.

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court decided Mr. Harte's case upon the basis of its decision in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), *rehearing denied*, 121 Nev. 25, 107 P.3d 1287 (2005), which rests upon independent and adequate state grounds. Accordingly, jurisdiction pursuant to 28 U.S.C. § 1257 is not appropriate.

REASONS FOR DENYING THE PETITION

The Petition presents no compelling reason supporting an exercise of this Court's jurisdiction. In fact, there are several reasons weighing against review by this Court. There were independent and adequate state grounds for the Nevada Supreme Court's decision in *McConnell v. State*, 102 P.3d 606 (2004). The Nevada Supreme Court properly distinguished its own statutory scheme from the Louisiana statutory scheme at issue in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Cases cited by Petitioner do not reflect a disagreement as to federal law as much as they show different jurisdictions applying different state laws which properly result in different treatment of the issue. Finally, assuming *arguendo*, if certiorari were granted by this Court and the decision in *McConnell v. State*, 102 P.3d 606 (2004) were overturned, Harte would be treated disparately than others who have already received relief pursuant to the decision in

McConnell, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1. **There Were Adequate and Independent State Grounds for the Decision. The Nevada Supreme Court Decided *McConnell* Under State Law: the Nevada Constitution and Nevada Revised Statutes. Also, the *McConnell* Decision Is Predicated Upon the State's Failure To Provide Jury Instructions that Comply with the State Statute.**

The adequate and independent state ground doctrine states that when a litigant petitions the United States Supreme Court to review the judgment of a state court which rests upon both federal and state law, this Honorable Court does not have jurisdiction over the case if the state ground is (1) "adequate" to support the judgment, and (2) "independent" of federal law. *See Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *See also Fox Film Corp. v. Muller*, 296 U.S. 207 (1935):

[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

Fox Film Corp., 296 U.S. at 210.

The Nevada Supreme Court in *McConnell* concluded that "Nevada's own constitutional bans against the infliction of 'cruel or unusual punishments' and the deprivation of life 'without due process of law' require this same narrowing process as that mandated by the Eighth Amendment." *McConnell*, 102 P.3d at 621, *citing* Nev. Const. Art. 1, §§ 6, 8(5). Upon review, the Court found that the Nevada Legislature's definition of felony murder does not afford said constitutional narrowing. *McConnell*, 102 P.3d at 622. Consequently, the Court ruled "it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." *McConnell*, 102 P.3d at 624 (emphasis added).

The State argued, in a bid for reconsideration of the *McConnell* decision, that the Nevada Supreme Court did not rely upon state law in making the decision, when in fact it did:

McConnell explicitly relied on the Nevada Constitution in addition to federal law: "We therefore deem it impermissible under the United States and Nevada Constitutions to base an aggravating circumstance in a capital prosecution on the felony upon which a felony murder is predicated." And we specifically identified the provisions of the Nevada Constitution that independently require aggravating circumstances to narrow death eligibility: "Nevada's own constitutional bans against the infliction of 'cruel or unusual

punishments' and the deprivation of life 'without due process of law.'"

McConnell v. State (McConnell II), 121 Nev. ___, 107 P.3d 1287, 1289-1290 (2005).

It is essential to note two things about the decision in *McConnell*: (1) the decision specifically addresses the broadly-defined Nevada statutory scheme of felony murder and does not make any finding that it is impermissible in all cases to "double-count" a felony upon which felony murder is predicated; and (2) on more than one occasion, it makes clear that its decision is based upon the unique provisions of the Nevada Constitution and its interpretation of the same. Since this Court does not generally find it proper to instruct the highest court in a state how it ought to interpret its own law, a grant of certiorari in this case would be improvident.

In addition, this Court should not grant certiorari in Mr. Harte's case because the *McConnell* decision is predicated upon the state's failure to provide jury instructions that comply with the statute, not just upon the invalidity of the statutory scheme. In Mr. Harte's case, the Nevada Supreme Court noted that, in application, the statutory language in the felony murder aggravating circumstances "could be overlooked and not considered by the jury," *State v. Harte*, 124 Nev. ___, 194 P.3d 1263, 1266 (2008), due to the failure of the instructions to track the language used in the statute. See Nev. Rev. Stat. § 200.033(4)(a, b). Likewise, in *McConnell*, the Nevada Supreme Court was concerned with the failure of

the jury instructions to mirror the language of the statute: "Another problem is that this added element can be overlooked and may not even receive consideration by the jury." *McConnell v. State*, 120 Nev. 1043, 1068, 102 P.3d 606, 624 (2004). After citing to the erroneous instructions given to the jury, the court concluded that the "jury was not informed that any further element needed to be found in regard to the two felony aggravators." *Id.* This Court should accordingly decline to review the instant case because the failure of the jury instructions to follow the language in the statute is a matter of state law that does not present an important issue warranting the Court's consideration.

2. Petitioner Does Not Show a Split of Authority Which Requires This Court's Involvement. Nor Does the Decision in *McConnell v. State* Represent Such a Split.

To begin, it must be emphasized that the decision in *McConnell* does not prohibit the "double-counting" of the felony murder aggravating factor – as Petitioner intimates in its attempts to create a split of authorities – but instead properly addresses whether Nevada's specific statutory scheme provides the requisite narrowing.

The *McConnell* decision is quite clear in its reasoning which distinguishes the Louisiana statutory scheme at issue in *Lowenfield* and Nevada's own statutory scheme regarding felony murder. The Court

recognized that Nevada's felony murder scheme, where "all felony murder is first degree murder, and all first-degree murder is potentially capital murder . . . is much broader, for example, than Louisiana's capital felony-murder statute in *Lowenfield*." *McConnell*, 102 P.3d at 622.

Further, Petitioner relies upon a number of decisions which do not support its position. For example, Petitioner cites to the decision in *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir.), *cert. denied*, 487 U.S. 1242, 108 S.Ct. 2918, 101 L.Ed.2d 949 (1988), arguing that it allowed for felony murder double-counting. However, as explained in that decision, the Louisiana statutory scheme at issue in *Byrne* provided the requisite narrowing at the guilt phase, where the statute provided that "First degree murder is the killing of a human being: (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery, or simple robbery." *Byrne*, 845 F.2d at 504, n.1. Contrary then, to Petitioner's assertion, closer inspection of the decision in *Byrne* shows us that it does not represent a split of authority, but two different results based upon two different statutory schemes.

Other authorities cited by Petitioner also do not support its position. In *Lawrence v. Branker*, 517 F.3d 700 (4th Cir. 2008), the Court recognizes that the law in North Carolina is that "where the defendant is convicted *only* of felony-murder, the felony supporting the felony-murder conviction cannot be submitted as

an aggravating circumstance to the capital sentencing jury." *Lawrence*, 517 F.3d at 712, citing *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 568 (N.C. 1979). In other words, the decision in *Lawrence* explains that in some circumstances a *McConnell*-like challenge has merit in North Carolina. Thus, the *Lawrence* decision is not contrary to the Nevada Supreme Court's decisions in *Harte* and *McConnell*, as asserted by Petitioner.

Petitioner also cites to *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), and argues that it, too, is contrary to the Nevada Supreme Court's decision in *McConnell*. However, the Ohio statutory scheme restricts the types of felony murder eligible for the death penalty and includes a requirement of premeditation and deliberation, that "either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." See *Scott*, 209 F.3d at 861, 885; Ohio Rev. Code Ann. § 2929.04(A)(7). This differs from the statutory scheme in Nevada. Put another way, the *Scott* decision explains that it rejects the *Lowenfield* claim because, in Ohio, the felony murder definition is narrowed by the Legislature. There, the Legislature "narrow[ed] the class of felony murders subject to the death penalty by excluding those who commit [murder in the course of an] arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance." *Scott*, 209 F.3d at 885.

In conclusion, the structure set forth in *Lowenfield* establishes the constitutional minimum required by the federal due process guarantee and the Eighth Amendment. The Nevada Supreme Court has made it clear that its decision in *McConnell* is based on the state constitution's requirement of narrowing in addition to this, see *McConnell*, 120 Nev. at 1063. Additionally, the *McConnell* decision is predicated upon the state's failure to provide jury instructions that comply with the statute, not just upon the invalidity of the statutory scheme. Thus, the *McConnell* analysis is not circumscribed in its entirety by *Lowenfield*. Accordingly, the Petitioner offers no legitimate rationale for this Court to accept certiorari to review the Nevada Supreme Court's decision in *Harte* or *McConnell*, given the extent to which those decisions are based on state law, as well as the Nevada Supreme Court's adequate reasoning that the Nevada statutory scheme at issue is distinguishable from that of Louisiana's relevant to the *Lowenfield* decision.

3. If Certiorari Were Granted and the Decision in *McConnell v. State*, 102 P.3d 606 (2004) Were Overturned, Harte Would Be Treated Disparately, in Violation of the Equal Protection Clause.

A number of defendants have already received relief based upon the decision in *McConnell v. State*, 102 P.3d 606 (2004). Shawn Harte is the last of the death row inmates in Nevada whose death sentence hinges solely on the felony murder aggravating

circumstances. The following Nevada capital habeas petitioners have all received relief and their death sentences have been set aside: Ronnie Milligan, Sixth Judicial District Court, Dept. I, Case No. CR-02289-1 and CR-02289-2, sentence of death vacated pursuant to hearing on July 21, 2008; Roger A. Libby, Sixth Judicial District Court, Dept. 2, Case No. 2980, sentence of death vacated by order filed November 06, 2008; Robert J. Farmer, Eighth Judicial District Court, Case No. 82-C-059320-C, sentence of death vacated by order January 08, 2007; Gregory Neal Leonard, Eighth Judicial District Court, Dept. II, Case No. C126285, sentence of death vacated by order on or about April 04, 2008; David Robert Riker, Eighth Judicial District Court, Dept. XVII, Case No. C107751, sentence of death vacated by order filed August 10, 2007; and David Pellegrini, Eighth Judicial District Court, Dept. IX, Case No. C77005, sentence of death vacated by order filed March 14, 2007.

Reversing the decision only in the instant case would permit Mr. Harte to be treated disparately from these other, similarly situated persons, thus violating the Equal Protection Clause of the Fourteenth Amendment. *See Roper v. Weaver*, 550 U.S. 598, 601-602, 127 S.Ct. 2022, 167 L.Ed.2d 966 (2007). This principle is also expressed by the concurring opinion in *State v. Harte*:

As *McConnell* is firmly entrenched in this court's jurisprudence and has been relied upon in providing relief to defendants who have received death sentences, overruling

that decision would be detrimental to the administration of justice.

Id., 194 P.3d at 168 (Hardesty, J., concurring). Accordingly, this Court should deny the petition for certiorari in order to avoid a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

There were independent and adequate state grounds for the Nevada Supreme Court's decision in *McConnell v. State*, 102 P.3d 606 (2004). The *McConnell* Court properly distinguished its own statutory scheme from that at issue in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), in light of the state's unique constitutional provisions and unique statutory scheme. Also, the *McConnell* decision is predicated upon the state's failure to provide jury instructions that comply with the state statute, not just upon the invalidity of the statutory scheme. Petitioner has overstated its case by citing cases which do not support its position. Finally, assuming *arguendo*, if certiorari were granted by this Court and the decision in *McConnell v. State*, 102 P.3d 606 (2004) were overturned, Harte would be treated disparately than others who have already received relief pursuant to the decision in *McConnell*.

For all these reasons, this Court ought to deny the petition.

Respectfully submitted,

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